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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 56

FEDERAL TRADE COMMISSION, PETITIONER

v.

SUN OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (R. 351–384) is reported at 294 F. 2d 465. The initial decision and proposed order of the hearing examiner (R. 12–33) are reported at 55 F.T.C. 955; the opinion of the Federal Trade Commission (R. 34–43) is reported at 55 F.T.C. 973, and the Commission's order (R. 34) at 55 F.T.C. 981.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1961 (R. 385). The time for filing a petition for a writ of certiorari was extended by Mr. Justice Black on October 20, 1961, to and including December 22, 1961 (R. 386). The petition was filed

on December 22, 1961, and was granted on February 19, 1962 (R. 387; 368 U.S. 984). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a marketer of gasoline, charged with price discrimination in violation of Section 2(a) of the Clayton Act, establish the defense that "the lower price * * * was made in good faith to meet an equally low price of a competitor" under Section 2(b), by showing that it gave the discriminatory lower price to one of its retailer customers in order to aid the favored retailer in competing with a service station retailing a different brand of gasoline.

STATUTE INVOLVED

Section 2 (a) and (b) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13 (a) and (b), provides in part as follows:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create

a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

STATEMENT

The Federal Trade Commission on January 5, 1959, entered a cease-and-desist order against respondent Sun Oil Company ("Sun") on the basis of the Commission's determination that Sun had violated Section 2(a) of the Clayton Act in the sale of gasoline, by granting price concessions to one of its retailer

customers in Jacksonville, Florida, that it did not give to other retailer customers engaged in competition with the favored customer in the same marketing area. Since Sun offered no evidence that the favored retailer had been offered gasoline by any other supplier, the Commission held that the price discrimination was not made by Sun in good faith "to meet an equally low price of a competitor" and was not justified under Section 2(b). (R. 38). The court of appeals reversed, holding that Sun had established the defense under Section 2(b).

The Commission's findings relating to the violation of Section 2(a) of the Clayton Act were not questioned by the court of appeals and the relevant facts on the issues presented to this Court are not in dispute.[1]

Respondent's Business.—Sun, a New Jersey corporation, is a major integrated producer-distributor of petroleum products, including gasoline (R. 15, 352). It is engaged in the refining, transportation, distribution and sale of gasoline and other petroleum products throughout the United States (R. 2–3, 352).

[1] The complaint filed by the Federal Trade Commission contained two counts. The first count related to the charge of price discrimination under Section 2 of the Clayton Act; the second count charged Sun with violating Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45, by entering into an agreement with the favored dealer to fix the resale price at which he sold gasoline. The hearing examiner and the Commission found that Sun had violated both statutes. The court of appeals set aside as not supported by substantial evidence the findings under the second count. Review of this ruling was not requested in the petition for a writ of certiorari.

It distributes automotive gasoline under the well-known brand name "Sunoco" in 18 states (R. 85).[2] Sun has adopted a distribution system under which it does not ordinarily distribute gasoline and other service station products directly to motorists at retail but sells to service station operators who lease their stations and facilities and purchase their gasoline for resale from Sun (R. 14, 15). Sun admitted that its lessee operators were independent contractors and both the Commission and the court below so found (R. 26, 35, 266, 352).[3]

Under this system of distribution, the expenses of operating the retail service stations and the risks of profit or loss in the retail operation rest with the serv-

[2] In 1954 Sun ranked 38th in the order of sales among the largest industrial corporations of the United States, 44th in assets and 36th in net profits. S. Rep. No. 2810, 84th Cong., 2d sess., p. 7. It ranked 13th among the largest integrated oil companies. H. Rep No. 1423, 84th Cong., 1st sess., p. 23.

[3] The development of Sun's marketing system is reviewed in *United States* v. *Sun Oil Company*, 176 F. Supp. 715 (E.D. Pa.). In that case the court, in a 1959 opinion, found that Sun over a period of years had violated Section 3 of the Clayton Act, 38 Stat. 731, 15 U.S.C. 14, by a program and course of conduct, implemented by written contracts, leases, and other direct and indirect activities, requiring its dealers to purchase gasoline and lubricants and automobile accessories exclusively from it and to refrain from purchasing such products from any of Sun's competitors. The program included short-term cancellable leases of Sun-owned or subleased stations and station storage facilities, the required use of Sun colors and trademarks as well as disciplining dealers by indirect methods such as tardy deliveries of gasoline, delays in repairs, and withholding equipment (176 F. Supp. at 727, 728, 737). The court also found that Sun had 6,984 dealers in 1956 (176 F. Supp. at 739).

ice station operator rather than with Sun, and the Sun service station operators do not have the benefits or protections of legislation covering the employment relationship. The consequences of direct operation by Sun of the retail service stations which it leases to the service station operators would, as observed by the court below, involve matters such as the application of chain store taxes, social security, wage and hours and collective bargaining legislation (R. 355, n. 6). Direct operation would also involve tort and workmen's compensation liability, income tax withholding and other matters.[4]

Sun subdivides its sales and distribution operations into regions, districts, and sales territories (R. 86, 87). At the time of the events in question in this case, Sun was supplying approximately 300 service stations in the region that included Florida. Only four of these 300 stations were operated directly by Sun, and one of the four was a training center (R. 88). Thirty-eight service station operators were selling Sun products in the Jacksonville, Florida, area (R. 15), which included three Sun sales territories (R. 16). Eight of these were in the territory which comprised the northern one-third of Duval County, in which Jacksonville is located (R. 16).

[4] In *United States* v. *Sun Oil Company*, *supra*, note 3, the court found that the enactment of chain store tax and social security legislation motivated Sun to shift from direct service station operation to its lessee-dealer program (176 F. Supp. 715, 731, 732). In the shift from direct operation to lessee-dealer operation, Sun converted employees into lessee-dealers. However, Sun sought to have actual operations continued as they had been prior to the shift (176 F. Supp. 715, 731).

Gilbert V. McLean was one of the eight Sun service station operators in this sales territory. He leased from Sun a service station located at the corner of 19th and Pearl Streets in Jacksonville (R. 15) and started operating the station on February 22 1955 (R. 57). Six of the other Sun dealers were fairly close to McLean's station (R. 16, 352, n. 1). As of June 1955, McLean and the other retailers of Sun gasoline in the sales territory were purchasing Sun's regular gasoline at 24.1¢ per gallon and retailing it at 28.9¢ (R. 15, 16, 26–27); their margin for overhead and profit was thus 4.8¢ per gallon.

The Discriminatory Price Allowance.—In June 1955 (less than four months after McLean started business), the Super Test Oil Company opened a service station diagonally across the street from McLean (R. 15). The record does not indicate the extent, if any, to which Super Test operated other than as a retailer or from what source it secured its gasoline, although there are indications that Super Test operated approximately 65 service stations (R. 319).[5] During most of the period between June and December 1955 Super Test sold its regular gasoline at 26.9¢ per gallon, 2¢ less than the price at which McLean was selling Sun's regular gasoline (R. 15). Since Super

[5] At this time Sun was supplying only one grade of gasoline and its dealers did not handle any other grade (R. 382).

[6] Except for the station located across the street from McLean's station, the record does not show the locations of the Super Test stations nor the prices they posted. It does show that Super Test gasoline was lower in octane rating than Sun's gasoline (R. 263) and that the Super Test station lacked facilities that McLean's station possessed (R. 262).

Test sold a so-called "non major" or "independent" brand of gasoline, as compared with a "major" name brand of which Sunoco was one (R. 15), this price differential did not adversely affect McLean's competitive position (R. 61, 76–77).[7] On a number of occasions, however, generally on weekends, the Super Test station across from McLean substantially reduced the price of its gasoline to as low as 21.9¢ per gallon (R. 15). On each of these occasions, McLean's sales at 28.9¢ a gallon (purchased from Sun at 24.1¢ a gallon) declined substantially (R. 15).

McLean complained to Sun about the inroads on his business resulting from Super Test's lower retail prices and sought relief in the form of a reduction in the price he was paying Sun (R. 15–16, 61, 62). At first Sun did nothing (R. 62, 166), but in late December 1955 it advised McLean that, if Super Test reduced its price again, Sun would come to his assistance (R. 26, 63). On December 27, 1955, Super Test reduced its price from 26.9¢ to 24.9¢ for regular gasoline. The same day, pursuant to the previous understanding, Sun gave McLean a price allowance or discount of 1.7¢ per gallon (R. 16). Sun required McLean to execute a Sun form letter requesting the reduction to meet a "depressed retail gasoline price situation" and stating the retail price which McLean would post (R. 273, 342). No price reduction was

[7] Two cents per gallon was the "normal" price differential between "major" brands and "non major" brands in the Jacksonville area at that time (R. 169). However, in what it termed a "sub-normal" price situation involving an independent brand, it was Sun's "normal" practice to have a posted retail price within one cent of the independent (R. 182–183).

given to any of the other Sun dealers in the marketing area (R. 16). McLean immediately (on December 27, 1955) cut the price of his regular gasoline by 3¢ from 28.9¢ to 25.9¢ (R. 16). This reduced McLean's margin from 4.8¢ to 3.5¢ so that he absorbed 1.3¢ of the retail price reduction (R. 16, 170, 171). It also cut the spread between his retail price and that of Super Test to 1¢.[8]

Super Test within the next day or two reduced its price for regular gasoline to 23.9¢ (R. 78, 81) thereby restoring the 2¢ differential (R. 169). No further price cuts occurred until a general price war, involving price cuts by other major suppliers, broke out in mid-February (R. 16, 90–91), whereupon, on February 16, 1956, Super Test cut its price to 22.9¢ (R. 329).

The Effects of the Discriminatory Price Allowance.—McLean's price reduction on December 27, 1955, concurrent with Sun's discriminatory price allowance to him, had immediate adverse effects on the other retailers of Sun's products in the McLean sales territory. Sun stations located at distances varying from less than a mile to approximately three and one-half miles from McLean's station (R. 36–37), and having locations on a common traffic and trade

[8] Willard Wright, a Sun Vice President, testified that a dealer who wanted to meet a competitive retail price, would under the company's policy be "allowed" a margin of 3.5¢ (R. 275, 278). Wright also testified that the supplier and not the dealer assumed "the major responsibility for promoting and guiding competition within the area" (R. 213), and that the company allowed dealers "what we consider the margin that he needs to continue in business" (R. 273).

pattern (R. 17, 18, 19, 20–22), lost business as a result of the price allowance granted McLean. Four of these dealers, Peery, McClung, Crabtree and Winning, testified at the hearing (*ibid.*). The Commission found that the four testifying dealers were competitively injured by the discriminatory price allowance to McLean (R. 36–37, 357). Dealers testified that they saw some of their former regular customers purchasing from McLean, and two stated that customers had told them they had switched to McLean because of McLean's lower price (R. 21, 47, 150, 188–190). At least three of them complained to Sun concerning the adverse effects of McLean's lower price, and they asked Sun to give them equal price allowances (R. 18–19, 21, 117). Sun, however, refused. In mid-February 1956, after a general "price war" had broken out in the Jacksonville area, and other major gasoline suppliers had already lowered their prices to their retail dealers (R. 90–91), Sun reduced the price at which it sold its gasoline to all its remaining dealers in the area (R. 16).

As a result of the price allowance given to him by Sun and the lower price at which he sold at retail, McLean's sales very substantially increased (R. 16, 28, 36). While his sales had averaged approximately 6,700 gallons per month during the previous six-month period, they amounted to 8,368 gallons in December 1955 (in which the lower price was in effect for the last five days) and 32,115 gallons in January 1956 (R. 354). During the same period the gasoline sales of the three complaining Sun dealers substantially declined (R. 36–37) and the fourth dealer testi-

fied to the loss of specific customers to McLean (R. 37).[9] On February 18, 1956, despite the increase in sales, McLean, who had cut his profit margin by 1.3¢ per gallon, went out of business (R. 39). Among the other Sun dealers in the sales territory who testified, McClung gave up his station in January 1956 because he did not have sufficient funds to pay cash for a Sun minimum gas delivery (R. 118); Peery ceased operating his station in September 1956 because it became "more * * * than I could handle" and because Sun failed to live up to promises to provide him with additional facilities (R. 51–52, 55–56); Crabtree also gave up his station in September 1956, although the record does not reflect his reasons (R. 143). Thus, only one of the five dealers who testified—Winning—remained a Sun dealer in the Jacksonville area at the time of the hearings (R. 187).

The Administrative Proceedings.—On September 26, 1956, the Federal Trade Commission filed a complaint charging Sun with violations of both Section 2(a) of the Clayton Act and Section 5 of the Federal Trade Commission Act (R. 2). After full hearings, the examiner issued an initial decision (R. 12), concluding that Sun had violated both statutes as charged, and proposing a cease-and-desist order (R. 32). The examiner rejected Sun's defense that its granting of the preferential discount to McLean had been a good faith effort to meet an equally low price of a competitor, on the ground that "the proviso in 2(b) has reference to the good faith meeting of

[9] There was also a loss of custom by the other Sun dealers for oil, lubrications, and other products and services (R. 59).

competition of the seller, and not the competition of the buyer, as in this case" (R. 23).

On appeal, the Commission affirmed, adopting the examiner's findings and proposed order (R. 34). The Commission found that there had been actual competitive injury to the nonfavored Sun dealers in the marketing area (R. 36–37). It found that, in addition, an inference of competitive injury could be drawn from a situation where (as here) one of several retailers, "selling an identical product at the same price and under substantially the same conditions" and "operating at a small margin of profit and in an area which was a reservoir of potential customers" who had easy access to all of them, "received a discount from a common supplier" (R. 37–38). With respect to the Section 2(b) defense, the Commission found that Sun's discriminatory discount was "not made to meet a lower price made to the latter by another supplier" but "to meet the competition of the Super-Test station across the street" (R. 38). It concluded that the theory that would justify such a purpose—*i.e.*, that Sun and its dealer were actually "competing as a unit with other channels of competition"—"goes beyond the plain wording of the proviso which has reference to the good faith meeting of competition of the seller, rather than that of the buyer" (R. 38).

The Decision Below.—The Court of Appeals for the Fifth Circuit reversed.[10] It reasoned that the gasoline sold by Sun was ultimately in competition with the

[10] The reversal of the Commission's finding of a violation of Section 5 is not presented for review (see note 1, p. 4, *supra*).

gasoline sold by Super Test; that Sun carried on this competition through its "conduit," McLean; that Sun believed McLean might be forced out of business, thereby thwarting Sun's efforts to compete with Super Test; and that therefore Sun was "entitled to assert the defense of meeting competition in good faith" (R. 379–380). The court rejected the Commission's view as "unnecessarily narrow, unrealistic in terms of the facts of life in marketing gasoline, and inconsistent with the purposes of the Robinson-Patman Act" (R. 360). It did not question the findings by the Commission under Section 2(a) relating to the competitive injury to the other Sun retailers in the marketing area, and the court "recognized that some dealers may suffer a diversion of business when the supplier lowers its price to meet competition" (R. 366).[11] The court, however, concluded that "[t]aking a coldly objective view of this case, one would have to say that, regardless of some injury to certain Sun dealers, Super Test's price cutting and Sun's response of making an allowance to McLean benefited consumers and the competitive process in at least two ways: by promoting competition at the retail level and by providing an opportunity for a major to break away from a uniform pricing system characteristic of

[11] The court did comment "it would seem impossible to say whether they [the non-favored dealers] suffered a substantial loss of gallonage from Sun's price allowance to McLean or from Super Test's aggressive price cutting" (R. 366). It did not, however, overrule the Commission's findings as to both actual and probable competitive injury to the non-favored dealers (R. 37–38).

an oligopolistic industry such as the oil industry" (R. 367, footnotes omitted).

SUMMARY OF ARGUMENT

Under the proviso of Section 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, a seller may offer as a defense to a charge of price discrimination in violation of Section 2(a) that the discrimination "was made in good faith to meet an equally low price of a competitor." The Commission held that, where Sun, a major oil company, had granted one of its retail dealers a discriminatory low price in order to enable that dealer to meet the retail price being offered by an independent competitor, thereby causing competitive damage to other nearby Sun dealers who did not receive the lower price, the Section 2(b) defense is not available to Sun. It concluded that the defense can be interposed only by a seller who seeks to meet a price that his competitor has actually offered his buyer and that it is not available to one who discriminates in order to meet his buyer's competition.

I

In so holding, the Commission was giving effect to the plain meaning of the statute. The normal and customary meaning of the word "competition" as used in the Section 2(b) proviso refers to competition at one level—*i.e.*, the seller's level—not competition at any economic level; when Congress has wished to legislate in terms of the latter concept, it has done so explicitly. Moreover, to construe the proviso as permitting the seller to grant his buyer a price designed to meet a

price offered by his buyer's competitor would not only rob the phrase "equally low price" of any real meaning, but would deprive the Commission of any objective standard for determining whether a discriminatory price had been given lawfully to meet a competitor's price or unlawfully to undercut that price.

The Commission's construction of the Section 2(b) proviso is consistent with its legislative history. The dominant purposes of Congress in bringing the proviso to its present form through the Robinson-Patman Act were (1) to strengthen the antitrust laws by "contraction" of the Section 2(b) defense; (2) to provide greater protection against supplier discrimination to smaller distributors; and (3) to shift the focus of the defense from a broad appraisal of the effect of discrimination on competition generally to a more narrow concern with its effect on actual victims. In confining the proviso to a seller's competition for the business of his purchasers, and in thus refusing to sanction a supplier's aiding one retailer in his quest for customers at the expense of other retailers, the Commission was not only giving the proviso the narrow construction intended by Congress, but it was honoring the legislative purposes of protecting small distributors against supplier discrimination, and of focusing upon actual injury resulting from the discrimination.

The only reported court decision on the question at issue (other than that of the court below) is *Enterprise Industries, Inc.* v. *Texas Co.*, 136 F. Supp. 420 (D. Conn.), in which a district court adopted the construction of the Section 2(b) proviso reached by the

its Bureau of Investigation over the signature of Harry A. Babcock, Director of the Bureau.[3] One such letter (App., *infra*, pp. 55-57) was sent on June 8, 1954 to James V. Cresente, President of the Cleveland Independent Gasoline Dealers Association, Inc., to explain why no action would be taken on seven complaints lodged against various oil companies,[4] and two such letters (App., *infra*, pp. 58-62) were sent on August 18 and November 22, 1954, to William D. Snow, General Counsel of the National Congress of Petr[illegible]n Retailers, Inc., concerning a complaint against [illegible]o on behalf of the Mississippi Service Station Operators Association of Jackson, Mississippi.[5]

The Babcock letters represented an application of what was then consistent Commission policy to refuse to proceed

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[3] The fact that the official administrative construction was made public in letters does not mean that it should carry less weight than a construction evidenced by a complaint, a decision in a litigated case before the Commission or in an administrative rule or regulation published in the Federal Register. Thus, in *United States* v. *Zucca*, 351 U. S. 91, 96 (1956), the Court referred to a single, unpublished, informal inter-departmental letter as furnishing proof of the administrative construction of the Act involved. Recently, in *Hanover Bank* v. *Commissioner*, 369 U. S. 672, 686 (1962), the Court relied on unpublished letters to taxpayers, who were not even involved in the pending litigation, as revealing "the interpretation put upon the statute by the agency charged with the responsibility of administering the revenue laws." Similarly, in *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231, 246-247 & nn. 12-13 (1951), the Court resorted to statements of members and counsel of the Federal Trade Commission, of representatives of the Department of Justice, and of similar spokesmen in order to ascertain the "understanding" of the scope of the Section 2(b) defense.

[4] The Cresente-Babcock correspondence is reprinted in Hearings on Distribution Problems before Subcommittee No. 5 of the House Select Committee on Small Business, 84th Cong., 1st Sess. 852-853 (1955). The seven complaints are reprinted in *id.* at 846 851.

[5] The Snow-Babcock correspondence is reprinted in *id.* at 459-463; Hearings on Price Discrimination: The Robinson-Patman Act and Related Matters before the House Select Committee on Small Business, 84th Cong., 1st Sess. 448, 913-916 (1955); Hearings on Amending Section 2 of the Clayton Act before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 84th Cong., 2d Sess. 89-92 (1956).

against an oil company for reducing its price to one of its dealers to enable him to meet a lower price of a competitor. During the early 1950's, the Commission had undertaken investigations in Pennsylvania, New Jersey, and in a number of Midwestern and Southern states, where oil companies had granted temporary price allowances to particular dealers. These investigations established that the pricing practices under inquiry had resulted from efforts by the oil companies to meet competition at the retail level during local gasoline price wars. But the investigations failed to provide any basis for a proceeding under the Robinson-Patman Act because, as the Commission interpreted the Act in its letters, Section 2(b) permitted an oil company to lower its price to a dealer to meet, and enable the dealer to meet, the competition of rival dealers selling gasoline at a reduced price during local price wars. The Commission flatly stated (App., *infra*, 56, 59-60):

> "[A] seller is within his legal rights in confining his price reductions to dealers in the vicinity of the dealer or dealers whose competition he seeks to meet, even though such action results in injury to customers to whom similar reductions are not made available."

The Commission therefore closed the investigations.[6]

B. The Original Construction Was in Fact Represented and Accepted as Official Commission Policy.

It goes without saying that the original construction of Section 2(b) is a source of considerable embarrassment

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[6] No less weight is accorded administrative policy which leads to negative action, such as closing investigations without filing a complaint, than that which leads to positive action, such as bringing suit. "[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U. S. 349, 352 (1941).

to the Commission in its efforts to brand unlawful what it once approved. In the *Texaco* case, now pending before a hearing examiner of the Commission, counsel for the Commission even went as far as to claim that the construction reflected by the Babcock letters "was not an official statement of the Federal Trade Commission," but merely an utterance "by a Director of the Bureau of Investigation." Tr. 5650, *The Texas Co.*, FTC Dkt. No. 6898.

This recent attempt to belittle the administrative construction of Section 2(b) is a far cry from the original understanding of the significance of the Babcock letters. In the first place, the letters themselves show that they embodied official Commission policy. Not only were they written on the Commission's letterhead, but throughout the letters there is constant reference to actions taken or not taken and decisions made by *the Commission*.[7]

Moreover, the Babcock letters were repeatedly referred to[8] and reproduced[9] in Senate and House hearings and reports on the premise that the letters reflected Commis-

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[7] For example, the following statements appear in the letters: "In no instance has *the Commission* issued a complaint where it has been shown that a major oil company reduced its price to a filling-station operator . . ." (App. *infra*, p. 61); "no corrective action has been taken by *the Commission* because of the defense available to the sellers under section 2(b) . . ." (App., *infra*, pp. 55-56, 59); "it would appear inadvisable for *the Commission* to initiate an additional investigation . . ." (App., *infra*, p. 62); "it is not believed that *the Commission* would be warranted in conducting further action with respect to this matter at the present time" (App., *infra*, p. 57) (emphasis added).

[8] See, *e.g.*, Hearings on Distribution Problems, *supra* at 148-160, 456-459; Hearings on Price Discrimination, *supra* at 906-907; Hearings on the Gasoline Price War in New Jersey before a Subcommittee of the Senate Select Committee on Small Business, 84th Cong., 1st and 2d Sess. 450 (1956).

[9] See fn. 4 & 5, *supra*, p. 10.

sion policy. Congressional committees,[10] representatives of the various dealer associations who had received the Babcock letters,[11] and Texaco[12] treated the view expounded in the Babcock letters as the Commission's then official position on the scope of the Section 2(b) defense; and so did the Chairman and other spokesmen of the Commission at the Hearings on the Gasoline Price War in New Jersey before a Subcommittee of the Senate Select Committee on Small Business, 84th Cong., 1st and 2d Sess. (1956). Chairman Gwynne specifically acknowledged "that the Commission has in the past 'sent out [such] letters,' " and that "drafts of . . . letters relating to the closing of investigations of gasoline price wars . . . [come] before the Commission for approval" prior to mailing (App., *infra*, p. 63) The Chairman thus made clear that the Commission took full responsibility for the Babcock letters and the interpretation embodied in them.

C. The Original Construction Was Formulated after a Careful Study of the Statute and a Thorough Investigation of the Alleged Discriminatory Practices.

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[10] See, *e.g.*, H. Rep. No. 1423, 84th Cong., 1st Sess. 18 (1955); S. Rep. No. 2810, 84th Cong., 2d Sess. 28 (1956); H. Rep. No. 2966, 84th Cong., 2d Sess. 170, 291 (1956); H. Rep. No. 2970, 84th Cong., 2d Sess. 63-64 (1957).

[11] See, *e.g.*, Hearings on Distribution Problems, *supra* at 457.

[12] Texaco has given price assistance to its service station dealers in reliance on this policy. This is reflected in a letter dated September 28, 1955, from Mr. S. C. Bartlett, Texaco's Vice President in Charge of Marketing, to Mr. Cash B. Hawley, President of the National Congress of Petroleum Retailers, Inc. (reprinted in Hearings on Price Discrimination, *supra* at 446; Hearings on Amending Section 2 of the Clayton Act, *supra* at 92-93). See also Hearings on the Gasoline Price War in New Jersey, *supra* at 394-395, 600-601.

The Babcock letters show that the Commission formulated its construction of Section 2(b) only after a careful study and thorough consideration of the statute itself, its legislative purpose and this Court's interpretation in *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231 (1951). They further predicate the Commission's construction upon the evidence and information obtained from its investigations, which were themselves thorough and extensive. As Mr. Babcock noted in his letter of November 22, 1954, to Mr. Snow (App., *infra*, pp. 61-62):

> "The investigations heretofore conducted have required the use of more than a proportionate share of the available funds and personnel, and . . . the funds and time expended . . . demonstrate a sincere desire on the part of the Commission to fully utilize its statutory authority in an effort to eliminate any actionable unfair methods of competition or discriminatory pricing practices in the petroleum industry."

D. The Circumstances Under Which the Commission Later Abandoned its Original Construction of the Section 2(b) Defense.

After the District Court decision in *Enterprise Industries, Inc.* v. *The Texas Co.*, 136 F. Supp. 420 (D. Conn.), in October, 1955, Chairman Gwynne and various staff members of the Federal Trade Commission were called to testify before a Subcommittee of the Senate Select Committee on Small Business. They were asked whether the Commission

agreed with the interpretation placed on Section 2(b) by the District Court in *Enterprise*. Hearings on the Gasoline Price War in New Jersey, *supra*, at 450-451. They answered that on May 3, 1955, prior to the *Enterprise* decision, the Commission in a directive to its staff had laid down guide lines which were consistent with the interpretation in *Enterprise* (*id.* at 451).

On March 9, 1956, Chairman Gwynne addressed a letter to Senator Humphrey in which he outlined the shift in Commission policy on Section 2(b) (*id.* at 458-459, App., *infra*, pp. 63-64). The Chairman explained that, in March 1955, a member of the Commission had requested the General Counsel to express his views on the application and scope of Section 2(b). In April, 1955, the General Counsel had advised the Commission that, based on a study of the language and legislative history of Section 2(b), "he was of the view that a discrimination in price granted by a seller to a buyer to enable the latter to meet the prices of his competitors was probably outside the protection of section 2(b)" (App., *infra*, p. 64), although the General Counsel apparently gave no definitive view. For purposes of administration and staff guidance, "primarily in connection with the scope of staff investigations," the Commission adopted the General Counsel's tentative view "and directed that the memorandum discussing the application of section 2(b) be reproduced and distributed to appropriate members of the staff," and that letters sent out in response to complaints of price discrimination be revised in a manner "consistent with the view expressed by the General Counsel" (App., *infra*, p. 64). Although Chairman Gwynne noted that the District Court in *Enterprise* had reached the same conclusion, he avoided any

reliance on *Enterprise* as a controlling precedent.[13] Instead, he pointed out that "the views thus expressed and adopted are necessarily speculative," and that "a final determination by the Commission must await decision in specific cases." This determination ultimately would have to be "controlled by the facts as they are developed in the specific cases and ... the application of the law to the facts ..., after briefs are filed and oral argument is had." Even then, however, the Chairman opined that "perhaps the final answer must await a decision on this point by the Supreme Court ..." (App., *infra*, p. 64). Chairman Gwynne thus made it clear that the Commission was not prepared to make a definitive change of policy at that time but that a tentative change had been made solely for purposes of testing the scope of Section 2(b) in an actual litigated case.

This is such a test case.

Against this background, one would have expected a comprehensive and reasoned analysis from the Commission when it finally came to decide this controversial question of law on a full record in the present proceeding. Instead, in a singularly cavalier *ipse dixit*, it summarily rejected Sun's meeting competition defense on the basis of the

[13] In 1957, the Second Circuit, in an opinion by Judge Learned Hand, reversed the District Court in the *Enterprise* case on the ground that the plaintiff had failed to prove damages [240 F. 2d 457, *cert. denied*, 353 U. S. 965 (1957)]. Accordingly, the Court of Appeals noted that it was "not necessary to consider whether the defendant proved its defense under" Section 2(b) (*id.* at 460). In the course of the opinion, however, Judge Hand indicated his understanding of price war economics in the gasoline industry (*id.* at 458): "It is not uncommon in the industry for a filling station to start what has come to be known as a 'gas war'; that is, to cut the prevailing price of gasoline, which other competing stations must meet by a corresponding cut in order to keep up their sales; and that makes it important, if indeed not necessary, for the producing companies to reduce their prices to their own competing stations. . . ."

"plain wording" of the statute—never, of course, mentioning its prior inconsistent construction or bothering to explain how the statute had become any clearer with age.[14]

This is not the first time that the Commission has attempted to eat its words in the field of statutory construction. This Court rebuffed such an attempt in *Standard Oil Co.* v. *Federal Trade Commission*, *supra*, after Standard had pointed out that the position taken by the Commission was "a complete reversal of its former treatment of the defense" (see Brief for Petitioner, pp. 28-32). The Court, in refusing to endorse the new administrative construction, noted that prior "actions and statements of members and counsel of the Federal Trade Commission" had reflected a contrary understanding of the law (340 U. S. at 246). There was a like rebuff in *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U. S. 349, 351-52 (1941).[15]

The Commission's "shift in its views" in the present case did not go unnoticed by the court below (R. 379 n. 42). Under the circumstances, it is hardly surprising that the Court of Appeals refused to bow to the Commission's "expertise" at the expense of "abdicat[ing] its judicial responsibility of construing the statute in the factual setting . . ." (R. 360). In holding that the Section 2(b) defense was applicable to the competitive situation presented, the lower court properly found "the Commis-

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[14] The District Court's opinion in *Enterprise*, which the Commission cited as supporting its ruling, rises to no higher analytical level than the Commission's opinion. It, too, rests exclusively upon what the court conceived to be the "plain wording" of the statute.

[15] In *United States* v. *Leslie Salt Co.*, 350 U. S. 383, 396 (1956), the Court rejected an interpretation of the Internal Revenue Code of 1939 advanced by the Treasury Department, stating: "Against the Treasury's prior long-standing and consistent administrative interpretation its more recent ad hoc contention as to how the statute should be construed cannot stand."

sion's construction of the Act unnecessarily narrow, unrealistic in terms of the facts of life in marketing gasoline, and inconsistent with the purposes of the Robinson-Patman Act" (R. 360).

II.

The Commission's revised construction of the meeting competition defense is not dictated by the plain words of the statute.

As in its opinion below, the Commission attempts to justify to this Court its revised construction of the statute by looking to what it claims to be the "plain" words of Section 2(b). The only thing plain about the pertinent statutory language is that it is far from a model of clarity. The most eloquent testimony of its latent ambiguities is furnished by the Commission's own seesaw constructions. As the court below noted, "the language of Section 2(b) seems imprecise enough to support either interpretation" (R. 369).

What, for example, is plain about the word "competitor"? To be sure, a competitor is one who competes. But competition, besides varying in kind and degree,[16] occurs at different functional levels.

Moreover, Section 2(b) refers to meeting an "equally low price"—not "an equally low *lawful* price". Yet the word "lawful" has been read into the statute.[17]

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[16] See *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377 (1956).

[17] See, *e.g.*, *Tri-Valley Packing Ass'n*, FTC Dkt. Nos. 7225 and 7496, Trade Reg. Rep. ¶ 15,893 (May 10, 1962); *American Oil Co.*, FTC Dkt. No. 8183, Trade Reg. Rep. ¶ 15,961 (June 27, 1962); cf. *Federal Trade Commission* v. *Staley Mfg. Co.*, 324 U. S. 746, 759-60 (1945); *Standard Oil Co.* v. *Brown*, 238 F. 2d 54, 56-58 (5th Cir. 1956).

The words "equally low price" cannot be taken literally in still another respect, for they have a qualitative as well as a quantitative significance. The Commission itself has taken the position that, where a seller's product by reason of brand preference customarily sells at a somewhat higher price than the similar product of a lesser-known competitor, the seller, by meeting his competitor's price on the nose, is guilty of "beating" competition.[18]

A further problem concerns the word "purchaser." Although the Commission reads the word as referring to direct customers (Br. 21), the Commission has considered the same word in other parts of the statute as referring to indirect customers as well.[19]

The Commission argues that, if Congress had intended to permit the meeting competition defense to be invoked in the present case, it would have added the following italicized language to Section 2(b): ". . . made in good faith to meet an equally low price of a competitor *or of a competitor or competitors of such purchaser or purchasers* . . ." (Br. 22). It is equally arguable that, if Congress had intended the result urged by the Commission, it would have written: ". . . made in good faith to meet an equally low price of a competitor *which such competitor had offered to such purchaser*" (emphasis added).

The fact of the matter is that Congress did not say, as the Commission contends, that it "intended to refer only to the seller's competition, at his own level, for the business

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[18] See, *e.g.*, *Anheuser-Busch, Inc.*, 54 F. T. C. 277, 302 (1957), *rev'd on other grounds*, 289 F. 2d 835 (7th Cir. 1961). See also *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234, 236 (2d Cir. 1929), *cert. denied*, 279 U. S. 858 (1929); *Gerber Products Co.* v. *Beech-Nut Life Savers, Inc.*, 160 F. Supp. 916, 920-21 (S. D. N. Y. 1958).

[19] See, *e.g.*, Brief for the Commission in Opposition, pp. 11-12, *American News Co.* v. *Federal Trade Commission*, No. 263, this Term, *cert. denied*, Oct. 8, 1962.

of those who buy directly from him" (Br. 21). As one commentator has pointed out, the statutory language is

> "the beginning rather than the end of the analysis. For in certain circumstances a rival's price *may* constitute competition for *both* the seller *and* buyer, which *both* must meet or lose the business on which *both* depend for their common survival."[20]

The problem, of course, with any exercise in textual analysis of the Robinson-Patman Act is that it tries to make literal sense out of a statute which has been variously described as "complex and anomalous,"[21] "prolix and perplexing,"[22] "obscure,"[23] "cryptic and sloppy,"[24] and "one of the most tortuous legislative pronouncements ever to go on the statute books."[25] Somewhat more charitably, this Court has observed that "precision of expression is not an outstanding characteristic of the Robinson-Patman Act." *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U. S. 61, 65 (1953).[26] With specific reference to Section 2(b), Judge Prettyman has said:

> "Misfits in words or phrases are not infrequently encountered when bills have been amended in the midst of debate or the floor of one or the other of

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[20] Rowe, *Price Discrimination Under the Robinson-Patman Act* 254 (1962).

[21] Markham, *The Report of the Attorney General's Committee on Antitrust Laws*, 70 Q. J. Econ. 193, 211 (1956).

[22] Attorney General's National Committee to Study the Antitrust Laws, *Report* 172 (1955).

[23] *Id.* at 175.

[24] Rowe, *Expectation Versus Accomplishment Under the Robinson-Patman Act, 1936-1960: A Statement of the Issues*, 17 A. B. A. Antitrust Section 298, 310 (1960).

[25] Dirlam & Kahn, *Fair Competition* 119 (1954).

[26] The Chief Justice reiterated this sentiment for a unanimous Court in *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 542 (1960).

> the Houses of Congress. This statute was amended on the floors of both Houses. It is not surprising that the final product is not perfectly meshed, as it might have been had it come undisturbed from the drafting board of a skilled draftsman."[27]

For this reason, it is necessary to go beyond "the infelicitous language"[28] of Section 2(b) in order to propound a statutory construction that would most accurately accord both with economic realities and the fundamental objectives of our antitrust laws.[29]

III.

The Commission's revised construction of the meeting competition defense is not supported by the legislative history of Section 2(b).

When the Commission limited the scope of Section 2(b) in its decision below, it did not cite any legislative history

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[27] *Exquisite Form Brassiere, Inc.* v. *Federal Trade Commission*, 301 F. 2d 499, 505 (D. C. Cir. 1961), *cert. denied*, 369 U. S. 888 (1962).

[28] *Automatic Canteen Co.* v. *Federal Trade Commission*, *supra*, 346 U. S. at 78.

[29] Cf. *United States* v. *Borden Co.*, 370 U. S. 460, 468 (1962), in which the Court noted that the cost justification defense was "literally susceptible" of one construction, but nevertheless adopted another construction more consonant with the legislative purpose; *Grand Union Co.* v. *Federal Trade Commission*, 300 F. 2d 92, 96 (2d Cir. 1962), in which the court observed that the omission of "buyers" from the literal terms of Section 2(d) was more "'inadvertent' than 'studious'." See also *Atalanta Trading Corp.* v. *Federal Trade Commission*, 258 F. 2d 365, 369 (2d Cir. 1958) ("of like grade and quality" inserted in Section 2(d)); *Elizabeth Arden, Inc.* v. *Federal Trade Commission*, 156 F. 2d 132, 133, 134 (2d Cir. 1946), *cert. denied*, 331 U. S. 806 (1947) ("engaged in commerce" inserted in Section 2(e) and "purchasers" in Section 2(e) modified by "competing"); *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F. 2d 988, 993, 994 (8th Cir. 1945), *cert denied*, 326 U. S. 773 (1945) (same); Rowe, *Price Discrimination Under the Robinson-Patman Act* 390-91 (1962).

as supporting its new view. But when it filed its petition for certiorari, the Commission argued that "[t]he legislative history of Section 2(b) supports the view that the Section 2(b) defense does not permit a seller to meet the competition of his buyer's competitor" (Pet. 11). Why this legislative history was not apparent to the Commission when it adopted its original contrary construction of the statute is a mystery—especially since the Commission had shortly before made an exhaustive review of the genesis of Section 2(b) in connection with its unsuccessful argument in *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231 (1951). Even now the Commission concedes that legislative history "may not be conclusive on the question presented" (Br. 25).

The concession should have been more unequivocal. As this Court noted in the *Standard Oil* case, the legislative history of the meeting competition proviso "at best, *is inconclusive.*"[30] Similarly, as the court below observed, the legislative record merely contains "Delphic generalities but no evidence that Congress considered the specific question at issue" (R. 369).

Nevertheless, the Commission now purports to be illuminated by its examination of the legislative history—or at least by the House Report, since this is the sole Congressional source referred to in its brief (Br. 25-27). The House Report, of course, is nothing new; it is hardly a document which might have been previously overlooked and recently unearthed. The fact of the matter is that nothing in the House Report or any other legislative reference sheds light on the precise problem at hand.

Under original Section 2 of the Clayton Act, price discrimination was prohibited only if it might substantially

[30] 340 U. S. at 247 n. 14 (emphasis added).

lessen competition or tend to create a monopoly. Even then it was a defense if the discrimination occurred "in the same or different communities" and was "made in good faith to meet competition." See *Standard Oil Co.* v. *Federal Trade Commission, supra,* 340 U. S. at 240. Congressional dissatisfaction with the coverage of the statute as originally enacted culminated in the Robinson-Patman amendments of 1936. The basic shortcomings of the Clayton Act were summed up in almost identical terms by both the House and Senate committees in explaining the addition of a third standard of illegality in new Section 2(a):

> "The existing law has in practice been too restrictive in requiring a showing of general injury to competitive conditions in the line of commerce concerned, whereas the more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injury in fact can the larger, general injury result."[31]

Under the third statutory standard, it would no longer be necessary to show that a price discrimination had the potential of rising to the level of a substantial lessening of competition or monopoly in the market as a whole. Section 2(a) now also reached discrimination "where the effect . . . may be . . . to injure, destroy, or prevent competition" among sellers, buyers, or their respective customers.

All of this, of course, has been known for years. Yet, it was not until the present litigation that the Commission perceived in this additional statutory standard in Section 2(a), and the accompanying legislative explanation quoted above, an intention on the part of Congress to narrow the substance of the meeting competition defense in Section

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[31] H. Rep. No. 2287, 74th Cong., 2d Sess. 8 (1936); accord, S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936).

2(b). The argument is a complete nonsequitur. It deliberately confuses Section 2(a) with Section 2(b).[32] Manifestly, to expand the offense is not to contract the defense.[33] On the contrary, there is no reason to assume that Congress intended to create an imbalance between the prohibition and the justification. If there be a need to meet competition, the defense should be recognized irrespective of the level of distribution at which the need arises. To be effective, the defense must be correlative with the offense.

By Section 2(b), Congress sheltered a discrimination in price when a seller showed "that his lower price . . . to any purchaser . . . was made in good faith to meet an equally low price of a competitor. . . ." The Commission interprets these changes in the meeting competition defense as a "'contraction' of the former proviso" (Br. 25). But, as *Standard Oil* makes abundantly clear, this "contraction" had an extremely limited effect:

> "The defense in subsection (b) . . . thus eliminates certain difficulties which arose under the original Clayton Act. For example, it omits reference to discriminations in price 'in the same or different communities . . .' and it thus restricts the proviso to price differentials occurring in actual competition. It also excludes reductions which undercut the 'lower price' of a competitor. *None of these changes, how-*

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[32] The Commission seeks to create the erroneous impression that the passage it quotes from the House Report manifests the congressional purpose in modifying Section 2(b) rather than Section 2(a) (Br. 27).

[33] An instructive analogy is provided by the amendment of Section 7 of the Clayton Act in 1950 by the Celler-Kefauver Act. The amendment made the statute applicable to asset acquisitions as well as stock acquisitions. See *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 316 (1962). But would anyone contend that by so doing Congress intended to eliminate or limit the "failing company" defense? See *United States* v. *Diebold, Inc.*, 369 U. S. 654 (1962).

> *ever, cut into the actual core of the defense.* That still consists of the provision that wherever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price. Actual competition, at least in this elemental form, is thus preserved."[34]

None of these changes in the meeting competition defense has the slightest bearing on the issue before this Court. Obviously this is a case of "price differentials occurring in actual competition," and there is no question here of "undercut[ting] the 'lower price' of a competitor."[35]

Since the Robinson-Patman Act did not eat into the "actual core" of the meeting competition defense—and it is that core with which we are concerned—the Commission can derive no comfort at all from the 1936 amendments. This it realized full well when it promulgated its original construction of Section 2(b) in the Babcock letters.

IV.

Upholding the meeting competition defense in this case accords with economic reality and is consonant with fundamental antitrust objectives.

A. The Lower Court's Construction of Section 2(b) Helps Foster Competition.

1. *The preferred position of meeting competition over uniform price treatment under the antitrust laws.*—The

[34] 340 U. S. at 241-42 (emphasis added); see *id.* at 247 n. 14.

[35] As the Commission points out in its brief (Br. 25 n. 17): "[T]he Commission affirmed the Examiner's finding . . . that Sun's purpose in granting the lower price . . . was to undercut . . . the price of Super Test. . . . The court below reversed on this issue . . . , and the Commission does not seek review of this ruling."

fundamental misconception that permeates the Commission's economic policy argument—once its unsound contentions respecting statutory language and legislative history are laid to rest—is that it erroneously assumes that uniform price treatment (or "equality of opportunity" (Br. 26), as the Commission prefers to call it) is the *summum bonum* of our antitrust jurisprudence and that meeting competition should be discouraged because it mars the symmetry of such uniformity. What the Commission has repeatedly failed to grasp is that competition, not price uniformity, is the overriding principle of antitrust law that governs our economic life—even though competition (as it invariably does) injures a competitor.[36] If the Robinson-Patman Act did not contain a meeting competition defense, the statute would be in hopeless conflict with the policy of the Sherman Act. The defense is absolute for a good reason; it represents paramount antitrust policy. Thus, we are not dealing with a defense which runs counter to established antitrust goals and which should therefore be construed narrowly; we are dealing with a defense which furthers those goals and should therefore be received hospitably. This was precisely the point which this Court made in the *Standard Oil* case.

In *Standard Oil*, the Commission had ruled "that the fact that the individual-service station operators had sus-

[36] "In any competitive economy we cannot avoid injury to some of the competitors. The law does not, and under the free enterprise system it cannot, guarantee businessmen against loss. That businessmen lose money or even go bankrupt does not necessarily mean that competition has been injured. 'Competition,' Mr. Justice Holmes observed, 'is worth what it costs.' We must always distinguish between injury to competition and injury to a competitor. To promote and protect competition is the primary function of the antitrust laws. However, we cannot guarantee competitors against all injury. This can only be accomplished by prohibiting competition." H. Rep. No. 1422, 81st Cong., 1st Sess. 5-6 (1949).

tained competitive injury as a result of the discrimination was alone sufficient to deprive the respondent of the Section 2(b) defense" (Br. 29).[37] This Court squarely rejected that ruling, for otherwise "the proviso would have such little, if any, applicability as to be practically meaningless" (340 U. S. at 250). In the Court's view, the Commission's interpretation struck at "the heart of our national economic policy [which] long has been faith in the value of competition" (*id.* at 248). The Court's precise holding was that, despite the fact that a discrimination in price may cause competitive injury, "it is a complete defense to a charge of price discrimination for the seller to show that its price differential has been made in good faith to meet a lawful and equally low price of a competitor" (*id.* at 246). In so holding, the Court stressed the importance of Section 2(b) as a means of preserving competition (*id.* at 246-249):

> "Representatives of the Department of Justice have testified to the effectiveness and value of the defense under the Robinson-Patman Act. We see no reason to depart now from that interpretation.
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> ". . . In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.' "

The Court noted that several commentators had suggested "that, in theory, the Robinson-Patman Act as a whole is inconsistent with the Sherman and Clayton Acts" (*id.* at 249 n. 15). But the Court disclaimed the need to "now reconcile, in its entirety, the economic theory which underlies the Robinson-Patman Act with that of the Sherman and Clayton Acts" (*id.* at 249) because it regarded

[37] See *Standard Oil Co.*, 41 F. T. C. 263, 282 (1945).

the meeting competition proviso as at least a means of partial reconciliation. Thus, the Court added (*ibid.*):

> "It is enough to say that Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor."

In short, the Court gave effect to the manifest purpose of Congress to give priority to meeting competition over uniform price treatment. Even though price differences might injure buyers in their competition—and Section 2(b) presupposes such a showing under Section 2(a)—such differences were to be immunized by the meeting competition defense. As the Court put it: "Actual competition, at least in this elemental form, is thus preserved" (*id.* at 242).

Following the Court's decision in *Standard Oil*, unsuccessful attempts were made to obtain legislation limiting the meeting competition defense.[38] In July 1957, Judge Victor R. Hansen, then Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, testified against the proposed narrowing of the meeting competition provision:

> ". . . Standard Oil seems consonant with the Nation's antitrust policy. A seller's right to meet a competitor's prices by granting price differentials to some customers without reducing his prices to all must remain an essential qualification to any

[38] Even under the proposed bills, the meeting competition defense would remain a complete defense if the effect of the price discrimination was only "to injure, destroy, or prevent competition" with sellers, buyers or their respective customers, but would be inapplicable if the effect of the discrimination "may be substantially to lessen competition or tend to create a monopoly. . . ." See, *e.g.*, S. 11, 86th Cong., 1st Sess. (1959); H. R. 11, 86th Cong., 1st Sess. (1959).

> anti-price-discrimination law. For a seller constrained by law to reduce prices to some only at the cost of reducing prices to all may well end by reducing them to none. As the Federal Trade Commission in 1953 recommended to Congress: 'The right to meet a lower price which a competitor is offering to a customer, when this is done in good faith, is the essence of competition and must be permitted in a free competitive economy.'[39]
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> "Anything less, I think would move the price-discrimination statute into irreconcilable conflict with the Sherman Act. . . .
>
> . . . . . .
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> "Thus, Standard Oil goes far to harmonize the Robinson-Patman Act with the basic tenor of antitrust policy."[40]

Judge Hansen's statement echoed the 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws, which had hailed *Standard Oil* in the same language (p. 181).

2. *The Commission's hostility to the meeting competition defense.*—In the light of the Court's pronouncement in *Standard Oil*, one would have expected the Commission to have accorded the meeting competition defense the preferred position that it deserves in a competitive society. Instead, since the Commission's shift from the position

[39] This 1953 recommendation was made shortly before the Babcock letters were prepared and prior to the Commission's reversal of position. If we go back twelve years earlier we find an even stronger pronouncement by the Commission: "The right of self defense against competitive price attacks is as vital in a competitive economy as the right of self defense against personal attack." Federal Trade Commission, *The Basing Point Problem* 139 (TNEC Monograph No. 42, 1941).

[40] S. Rep. No. 2010, 85th Cong., 2d Sess. 52-53 (1958).

taken in the Babcock letters, it has consistently reacted as if *Standard Oil* had never been decided; it has not upheld the Section 2(b) defense in a single adjudicative proceeding.[41] Whenever the seller's need to meet competition conflicts with selling to his customers at identical prices, the Commission invariably decides in favor of price uniformity.

Perhaps the frankest exposition of the Commission's view—and one which obviously clashes head-on with the philosophy of *Standard Oil*—appeared in the brief which it filed with the Seventh Circuit in the *Sunshine Biscuits* case earlier this year. There it argued that Section 2(b) was "not written as the remedial portion of the Act intended to effectuate the Congressional will of preventing injury to competition," and that it is "an inconsistent proviso" which "must be strictly construed . . . , [for] the broader it is construed, the more inconsistent it becomes with the basic purposes of the amended Clayton Act." Brief for the Commission, p. 38, *Sunshine Biscuits, Inc.* v. *Federal Trade Commission*, 1962 Trade Cases ¶70,394 (7th Cir. 1962).

In *Sunshine Biscuits*, the Commission had ruled that a seller may not meet competition by matching a competitor's price if the sale would be to a new, rather than existing, customer. The Seventh Circuit reversed, stating (1962 Trade Cases at p. 76,608):

> "That the distinction between old and new customers is economically unsound and would defeat the purpose of the Robinson-Patman Act seems obvious. . . . [Under this distinction] competition for new customers would be stifled and monopoly would be fostered. In such situations an established

[41] Indeed, the only reported decision we have found in which the Commission sustained the meeting competition defense was an alternative holding handed down 25 years ago. *Shefford Cheese Co.*, 25 F. T. C. 1209, 1212 (1937).

> seller would have a monopoly of *his* customers and a seller entering the market would not be permitted to reduce his prices to compete with his established rivals unless he could do so on a basis such as cost justification."

Another graphic illustration of the Commission's desire to read the meeting competition defense out of the Act was its decision in *Exquisite Form Brassiere, Inc.*, FTC Dkt. No. 6966, Trade Reg. Rep. ¶29,195 (Oct. 31, 1960).[42] Although the defense concededly applied to violations of Section 2(e), under which the seller *renders* promotional services or facilities to his buyer, the Commission held that the defense was unavailable in a Section 2(d) case, where the seller *pays for* such services or facilities rendered by the buyer. On appeal, the Court of Appeals for the District of Columbia Circuit rejected the Commission's wooden reading of the statute, declaring:

> "The economic evil sought to be outlawed by . . . [the statute] is the same whether the services and facilities are furnished to the customer or by the customer with reimbursement, so long as discrimination is practiced. Congress was here dealing with a fundamental economic concept; it was not shadowboxing or indulging in fine semantic shadings."[43]

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[42] Accord, *Henry Rosenfeld, Inc.*, 52 F. T. C. 1535, 1552 (1956); *J. H. Filbert, Inc.*, 54 F. T. C. 359, 364 (1957); *Admiral Corp.*, 55 F. T. C. 2078 (1959); *Shulton, Inc.*, FTC Dkt. No. 7721, Trade Reg. Rep. ¶29,783 (July 25, 1961), *rev'd*, 1962 Trade Cases ¶70,321 (7th Cir. 1962), *modified*, 1962 Trade Cases ¶70,393 (7th Cir. 1962).

[43] *Exquisite Form Brassiere, Inc.* v. *Federal Trade Commission*, 301 F. 2d 499, 502 (D. C. Cir. 1961), *cert denied*, 369 U. S. 888 (1962); accord, *Shulton, Inc.* v. *Federal Trade Commission*, 1962 Trade Cases ¶70,321 (7th Cir. 1962), *modified*, 1962 Trade Cases ¶70,393 (7th Cir. 1962).

The Commission recently delivered another blow to the meeting competition defense in *American Oil Company*, FTC Dkt. No. 8183, Trade Reg. Rep. ¶15,961 (June 27, 1962), and in *Tri-Valley Packing Ass'n.*, FTC Dkt. Nos. 7225 and 7496, Trade Reg. Rep. ¶15,893 (May 10, 1962), holding that the respondents had to prove that in meeting competition there was reason to believe that the prices of their competitors were lawful, rather than merely show that there was no reason to believe that such prices were unlawful. But as Commissioner Elman pointedly replied in his *Tri-Valley* dissent (Trade Reg. Rep. at p. 20,706):

> "Where a seller in an active market . . . invokes the meeting-competition-in-good-faith defense allowed by Section 2(b), considerations of elementary fairness . . . preclude imposition on him of a heavier burden than showing that he had no reason to suppose that the competitive lower prices he was meeting were unlawful. The law should not be construed as forcing a seller to compete at his peril. . . . [I]f the statute is not to be made an impediment to free and fair price competition, the lower price met by a seller in good faith in a competitive situation should be deemed to be lawful if the seller shows that he neither knew nor had reason to believe that it was unlawful, *and* if no counter-showing is made of facts known to the seller which would indicate to a reasonable and prudent businessman that the lower price was probably unlawful."[44]

[44] Similarly in *American Oil*, Commissioner Elman observed in dissent that (Trade Reg. Rep. at p. 20,796): " 'Good faith' does not require businessmen to be put in the impossible dilemma of either (1) losing business by not meeting competitors' lower prices, or (2) meeting the competitive lower prices and running the risk that years later the Commission will find these 'third-party' prices to be unlawful, after complex and protracted proceedings whose outcome could not confidently be predicted even by legal experts specializing in the field of trade regulation."

No one can deny that the Commission's stand in the present case is in the mainstream of its hostile approach to the meeting competition defense in Robinson-Patman Act cases. The blunt truth of the matter is that the Commission administers the statute as if it did not contain a meeting competition defense. Notwithstanding the *Standard Oil* decision, the Commission evinces preoccupation with injury to competitors and fails to recognize the primacy of the need to meet competition. By insisting on proof of an actual offer to the seller's customer—something it knows does not accord with economic reality in the marketing of gasoline—the Commission would suppress meeting competition in the gasoline industry. That this would indeed be "the practical effect of adopting the Commission's view" was squarely recognized by the Court of Appeals (R. 370).

3. *The economic realities of the gasoline industry.* The principal competition among gasoline suppliers is not at the wholesale level in vying for daily sales to retail outlets. Rather, the suppliers compete for the motorist trade through their dealers at the retail level because of "the nature of gasoline, the necessity for its bulk merchandising, the responsibility of the refiner or supplier for advertising, [and] the dependent relation of the supplier on its dealers and the dealers on a single supplier . . ." (R. 370). The nature of this competition in the gasoline industry was accurately described by the court below (R. 371):

> "The gas station retailer is a rare bird among retail merchants. His business is built around pumps which can be used for his supplier's gasoline. Sun sells Sunoco in pumps that say 'Sunoco'. Its competitor at 19th and Pearl in Jacksonville, Super Test,

sells its gas in pumps that say 'Super Test'. Sunoco gasoline flows unchanged from Sun through Sun pumps to motorists. Sun, not some small retailer, bears the primary responsibility for advertising and for puffing Sunoco against Super Test and other gasolines even though the sales which are competitive take place at the consumer level. . . .

"As Mr. Justice Jackson has pointed out: 'Retailers' storage capacity usually is limited and they are in no position to accumulate large stocks. They can take gas only when and as they can sell it'. [Dissenting opinion in the *Standard Stations* case, *Standard Oil Co.* v. *United States*, 337 U. S. 293, 323, (1949)]. The suppliers, therefore, must maintain gasoline stocks to meet the needs of the ultimate consumer—the motorist; and a service station, therefore, primarily is what the word indicates—a *service* station. In gasoline marketing the supplier simply cannot be cut off from the filling station operator and treated as if it competed only for the business of filling stations; oil companies compete with each other for the consumer's business."

Mr. Justice Jackson, dissenting in the *Standard Stations* case, made these further pertinent observations (337 U. S. at 323):

"[T]he retailer in this industry is only a conduit from the oil fields to the driver's tank, a means by which the oil companies compete to get the business of the ultimate consumer—the man in whose automobile the gas is used. . . . The retail stations, whether independent or company-owned, are the instrumentalities through which competition for this ultimate market is waged."

Many economists and students of the industry have voiced similar views.[45]

What the Commission would require to invoke the defense—a direct offer by Super Test, Sun's competitor, to McLean, Sun's customer—is not the way that Super Test or any other oil company competes. Since one Super Test station was sufficient to handle the potential custom at 19th and Pearl Streets in Jacksonville, Super Test would hardly offer its gasoline to McLean, and McLean would hardly agree to become the second Super Test station at that corner. Although there is keen competition among the oil companies for service station outlets in the first instance,[46] once such outlets have been obtained and are handling the gasoline of a particular supplier, it is rare that another supplier would want his products to be sold at the same

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[45] See, *e.g.*, Cassady, *Price Making and Price Behavior in the Petroleum Industry* 236-238 (1954); Cassady & Jones, *The Nature of Competition in Gasoline Distribution at the Retail Level* 70-74, 89-92, 108-12 (1951); De Chazeau & Kahn, *Integration and Competition in the Petroleum Industry* 476, 480 (1959); 1 Whitney, *Antitrust Policies* 125-26 (1958). See also a discussion of the relationship of dealer to supplier in the record (R. 212-17, 250-51).

[46] The Commission's contrary implication (Br. 34-35) is plainly unwarranted. In *Osborn* v. *Sinclair Refining Co.*, Civ. No. 9769 (D. Md. 1959), the District Court made a specific finding that "[a]t all times pertinent in this case, experienced and efficient service station operators were greatly in demand, and the number of such experienced and efficient operators available was substantially less than the number of stations available. All major Oil Companies were in active competition to obtain the services of experienced and efficient service station operators" (Finding 76). The District Court's opinion (171 F. Supp. 37) was subsequently reversed on other grounds [286 F. 2d 832 (4th Cir. 1961), *cert. denied*, 366 U. S. 963 (1961)]. In *United States* v. *Sun Oil Co.*, 176 F. Supp. 715 (E. D. Pa. 1959), the District Court similarly observed (176 F. Supp. at 720) that "new competitors seek to establish their own outlets, either by erecting new stations or by winning existing wholesale distributors or retail dealers from other suppliers."

station with a competitive gasoline. And it is just as rare that the dealer will want a split-pump operation.[47]

The Commission does not dispute that these are the facts of economic life in the gasoline industry. Quite the contrary, the Commission itself emphasizes the conduit type of competition prevailing in the industry when it questions the "independence" of the retail service station dealer (see Br. 6 n. 4, 9 n. 3, 34-35). What the Commission says is that Section 2(b) was never intended to cover such an industry because "the likelihood that the objective requirements of the Act will or will not be met in any particular situation certainly provides no basis for writing new exceptions to the Act; such an interpretation not only renders the statute unworkable and indefinite but reopens the debate on basic economic policy that Congress sought to resolve by passing the Act" (Br. 45 n. 27).[48]

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[47] Split-pump stations sell more than one brand of gasoline. "There are relatively few 'split-pump' arrangements left in most market areas." Cassady, *Price Making and Price Behavior in the Petroleum Industry* 58 n. 23 (1954); see 1 Whitney, *Antitrust Policies* 129-30 (1958). In *United States* v. *Sun Oil Co.*, *supra*, the District Court pointed out that over 99% of the branded gasoline purchased by the motoring public in the relevant market was dispensed at stations which carried the products of a single supplier (176 F. Supp. at 720), and indeed specifically acknowledged that "Sun's marketing practice with respect to gasoline does not foreclose all its competitors from selling their brand of gasoline at Sun's independent dealer stations for such competitors choose not to sell to Sun dealers" (*id.* at 727).

[48] The Commission attempts to provide a second answer as well. Despite the fact that Judge Wisdom pointed out that the "gas station retailer is a rare bird among retail merchants" (R. 371), the Commission states that "*all* producers of consumer goods . . . distribut[e] . . . their product to the public through the 'conduit' of retail outlets, which may or may not handle the products of competing producers . . ." (Br. 36). But surely the Commission must recognize the manifold differences between a service station flying the colors of a single gasoline supplier and an ordinary retail outlet offering side by side a variety of competing brands of the same product. Clearly, Mr. Justice Jackson in the *Standard Stations* case had no difficulty in seeing the distinction.

This argument, of course, presupposes that Congress preferred price uniformity to competition when it enacted the meeting competition proviso as a complete defense to a charge of price discrimination, whereas precisely the opposite is true. Allowing Sun to have the benefit of the meeting competition defense neither writes a new exception into the Act nor reopens the debate on basic economic policy. Nor does it render the statute unworkable or indefinite. As *Standard Oil* makes clear, the meeting competition defense is absolute wherever a seller reduces his price in good faith to meet the lower price of a competitor. In view of the conduit nature of competition in the gasoline industry, one would have to ignore plain economic realities to deny that Sun's allowance to McLean was for the purpose of meeting the lower price of Super Test--Sun's own competitor, as well as McLean's.

In an effort to prove that its revised construction of the statute is consistent with *Standard Oil*, the Commission argues that "[t]he Court's entire discussion of the Section 2(b) defense was in terms of a seller's matching a lower price *actually offered* to his customer by one of his (the seller's) competitors" (Br. 29), whereas "no competitor of Sun had offered its buyer, McLean, a lower tank-wagon price for gasoline . . ." (Br. 30-31).

To be sure, the Court in *Standard Oil* spoke of a competitive offer, but that was in a factual context—sales to jobbers—in which there were such offers. Nothing in *Standard Oil* indicates that a competitive offer to the favored customer is a *sine qua non* to invoking the meeting competition defense where such offers do not exist because the immediate price competition which must be met occurs at the next level of distribution. The Commission itself never recognized any such requirement in *Standard Oil*

when it promulgated its original construction of Section 2(b) in the Babcock letters. At that time apparently it was more impressed by the Court's further observation that "*wherever* a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price" [340 U. S. at 242 (emphasis added)].

In the present case, it is indisputable that Super Test's price threatened "to deprive" Sun of McLean as a customer by driving him out of business. Super Test's price also threatened "to deprive" Sun of retail sales through McLean to the motoring public. Sun could have waited until doomsday, and Super Test would still not have offered its gasoline to McLean for resale at his Sun station. To nevertheless require such an offer as a condition precedent to permitting Sun to meet Super Test's competition is tantamount to saying that Sun cannot defend itself at the economic level at which it competes; to use Judge Wisdom's expression, Sun and McLean must remain "sitting duck[s]" (R. 354). "Clearly, a seller's need for a lower price in response to a decrease in his sales is the same whether the decrease occurs because his purchasers switch to a price cutting competitor or because they are unable to protect their share of the retail market from distributors of a rival product." Note, *The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised*, 66 Yale L. J. 935, 939 (1957). Since Sun admittedly could have invoked Section 2(b) had Super Test attempted to increase its market share by offering gasoline to McLean at a lower price, Sun should be able to invoke the defense when Super Test attempted to increase its market share by undercutting McLean. Sun's defensive lower price to McLean and McLean's subsequent lower price

to the motoring public, in fact, met "in good faith *their mutual competitor's* equally low price at the pump."[49]

By allowing Sun the benefit of the meeting competition defense, the court below plainly helped promote competition at the retail level. Sun's allowance to McLean was meant to preserve McLean as a competitor at the corner of 19th and Pearl as well as to preserve Sun's competition with Super Test through McLean at that location. The only answer the Commission has is that Sun's action was not successful (Br. 48). But this is beside the point. Success is not the measure of the statutory defense. Had Sun not acted so hesitantly in granting the price allowance, McLean might still be in business today.

We wish to underscore the extreme nature of the Commission's argument. Not only is it contending that a seller may only meet a competitive price at his own level and may not assist his customer to meet competition at the customer's level; it is contending that the seller may not even reduce his price to a customer to meet competitive prices at the seller's own level unless there has been an actual offer of a lower price to that customer. If such an offer were a condition precedent to meeting competition at the seller's level, this would mean that a seller doing business in more than one geographic market could not meet a competitor's publicly announced general price reduction in but one of those markets. In the case of each of his customers, the seller would have to wait on the side lines until his competitor had raided that specific customer and then hope to arrive on the scene in time to match the lower competitive offer, rather than defend his business once the competitor's

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[49] Rowe, *Price Discrimination Under the Robinson-Patman Act* 255 (1962).

general price reduction had become known in the market. Thus, the only safe way for the seller to maintain his sales in the market where his competitor was quoting the lower price, without risking liability for territorial price discrimination, would be for him to reduce his price to the same level in all of his markets. It is inconceivable that Congress ever intended to place competitors in such a strait jacket. The statute speaks of meeting the equally low price of a competitor; it says nothing about offers. A publicly announced price of a competitor is his price. As a matter of business economics, if there is to be competition in the marketplace, there must be a right to match a competitor's area prices as well as his direct offers to specific customers. Cf. *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356, 366 (9th Cir. 1955), *affirming* 104 F. Supp. 796, 807 (S. D. Cal. 1952), *cert. denied*, 350 U. S. 991 (1956).

4. *The difference between meeting competition and predatory price cutting.*—The Commission advances the novel argument that the decision below, instead of promoting competition, will impede detection of predatory price behavior. Its theory is that "when the Section 2(b) defense is applied without regard to the levels on which competition is conducted, there is no sure measure of either the purpose of a price cut or the extent to which the one price is actually 'responsive' to another" (Br. 43).

In light of this argument, one would think that Sun rather than Super Test made the price raid on McLean, that Sun rather than Super Test put McLean out of business, and that Sun rather than Super Test won the price war at 19th and Pearl Streets. It may be that "localized price-cutting by a large firm for the purpose of driving

a smaller firm out of business" is "one of the oldest and most insidious of predatory practices" (Br. 32). But the question is wholly academic here. There is no question but that Sun acted in complete good faith in its effort to save its dealer by meeting—not beating—competition. Even the Commission grudgingly admits that "Sun was not the first to cut its prices" and that "its action was apparently intended to be responsive to price cuts by the Super Test station across the street from its dealer, McLean" (Br. 43). Sun's response was the antithesis of predatory pricing—a carefully studied lower price to a single dealer in contrast to a reckless general price slash. The only conceivable criticism that can be leveled against Sun is that, in its desire to make certain that the facts warranted action, it waited too long.

The Commission, of course, prefers to shy away from the present record and conjure up a chamber of horrors for the future. But it fails to give concretion to its fears. Since it is transparently clear that Sun had a legitimate motive in meeting competition here, why assume that the purpose of other gasoline suppliers will be obscure in other price war situations? Since it is equally evident that Sun's wholesale price allowance was actually responsive to Super Test's price cut at the retail level, why assume that such responsiveness will be less demonstrable in other cases? The Commission need have no concern that, because "the wholesaler is not responsible for the exact price set by the retailer[,] there can be no objective basis for deciding that the seller's purpose in granting the discriminatory price was to undercut a retail competitor, even though that may be what the dealer actually does" (Br. 24-25). If McLean had used Sun's competitive allowance to undercut Super Test—a readily demonstrable

fact—Sun obviously would not have been acting in good faith if it had continued to grant the allowance.[50] What is more, the burden of establishing a Section 2(b) defense is on the respondent, not the Commission. Hence any problems of proof on this issue are those of the seller who asserts that he met competition in good faith.

Significantly, the Commission cites no evidence to show that a localized price cut by a major gasoline supplier was ever used to drive smaller independent gasoline marketers out of business. On the contrary, during the late 1940's and early 1950's, when the Commission accorded the oil companies the benefit of the meeting competition defense, the non-majors nevertheless prospered and flourished. Their number grew; their sales volume increased; their share of the market expanded.

In 1957, Subcommittee No. 5 on Distribution Problems stated in its Interim Report to the House Select Committee on Small Business that "[a]n increasing and major factor in petroleum marketing is the phenomenal growth in recent years of the multiple-pump, unbranded retail dealer." H. Rep. No. 1157, 85th Cong., 1st Sess. 13 (1957). Business Week (May 17, 1955, p. 66) cited an estimate that "the independents accounted for 10% of total national gallonage of gasoline 10 years ago; today, nearly 25%." This finding was supported by National Petroleum News (May 1958, p. 137), which noted that estimates of gallonage for the independent non-major companies "in some key markets rose from 15% to 50%." De Chazeau and Kahn also attest to this remarkable growth by citing a "survey of the market share of 'local brands' in 182 local retail markets

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[50] Sun in fact would not continue to grant the allowance under such circumstances (R. 285).

for 1955 and 1956" prepared by the Shell Oil Company.[51] The survey "showed thirty-two markets in which . . . [the independents'] share amounted to 30 per cent or higher in . . . [1956], with more increases than decreases compared with 1955. The median shares in 1955 and 1956 were 7.5 and 8.7 per cent in Shell's East Coast Division, 24.6 and 27.1 per cent in the Midwest, and 15.8 and 17.6 per cent on the West Coast . . . ."[52] These figures certainly belie the notion that the availability of a meeting-competition defense in the gasoline industry exposes the smaller oil companies to predatory price attacks by their larger competitors.

The figures do more. They attest to the vigor and intensity of competition in the gasoline industry—an industry composed of a large number of sellers effectively vying for the custom of buyers. The Hearing Examiner in this case, referring to conditions in 1955-56, expressly recognized that competition in the sale of gasoline is extremely keen (R. 21, 22-23). This observation applies with even greater force today.

In making its predatory pricing argument, the Commission again betrays its failure to recognize the role of the meeting competition defense as a vital force in our competitive society. Far from encouraging predatory price cutting, the defense is designed to permit a seller confronted by "a price raid by a competitor"[53] to protect itself in the competitive struggle. This is true irrespective of the size of the seller making the raid or the size of its target.

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[51] De Chazeau & Kahn, *Integration and Competition in the Petroleum Industry*, 540 n. 21 (1959).

[52] *Ibid.*, *see* H. Rep. No. 1157, *supra* at 14. See also De Chazeau & Kahn, *supra* at 100; Cassady, *Price Making and Price Behavior in the Petroleum Industry* 66 (1954).

[53] *Standard Oil Co.* v. *Federal Trade Commission*, *supra*, 340 U. S. at 249.

There is all the difference in the world between a policy of predatory price cutting and one of lowering prices in self-defense. And there is no reason to suppose at this late date that the courts have lost their ability to distinguish between the two.

B. The Lower Court's Construction of Section 2(b) Helps Protect the Small, Independent Businessman.

In addition to fostering competition, the right of a supplier to meet competition in a price war at the retail level also furthers the purpose of the Robinson-Patman Act to promote local ownership and protect the small, independent businessman.

1. *The consequence of allowing the burden of price wars to fall on the small retail dealer.*—The Commission's argument focuses on the four Sun dealers (Perry, McClung, Crabtree and Winning) who supposedly suffered competitive injury within the meaning of Section 2(a), rather than on the Sun dealer (McLean) who was threatened with business extinction by Super Test's price aggression and therefore needed protection under Section 2(b). Although the Commission does not deny that McLean was in fact driven out of business by Super Test, it says that one victim is better than four.

Even if the Commission's arithmetic were unimpeachable, its conclusion would still be wrong. As pointed out in *Standard Oil*, the determination of who is to sustain competitive injury, if any, and who is to be protected, was made by Congress by its very inclusion of the meeting competition defense in the statute.

In point of fact, however, despite the Commission's claim of actual competitive injury to Sun's four other dealers in the form of a diversion of business, the court

below noted that "it would seem impossible to say whether they suffered a loss of gallonage from Sun's price allowance to McLean or from Super Test's aggressive price cutting" (R. 366). What is more, any gallonage loss by these four dealers, who were about one to three miles away from 19th and Pearl Streets where the price war was raging, was trivial compared with the mortal blow struck at McLean.[24]

Moreover, it should be remembered that price discrimination is prohibited by Section 2(a) without proof of actual injury to competition; potential injury is enough. Hence, to accept the Commission's argument is to give greater weight to the *potential* injury of buyers who do not receive the allowance than to the *actual* injury of the buyer whose economic survival may well depend on receipt of the allowance.

Even if there were facts in the record to show actual injury to the four other dealers, there is no reason to assume that these dealers would have fared better if Sun had not given McLean a price allowance. Clearly, if competitive harm did occur to the other Sun service stations, it originated not with Sun's price allowance to McLean but with Super Test's price cuts. So long as Super Test continued to sell gasoline below the price of the other

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[24] Obviously, neither Sun nor any other oil company would sacrifice four dealers to save one. The cases cited and quoted in the Commission's brief (p. 11) that some of these four Sun dealers went out of business because of Sun's allowance to McLean. The record conclusively demonstrates that this is not so. McClung ceased operating as a Sun dealer in the latter part of January, 1956, because he was a poor credit risk and did not have funds to purchase gasoline (R. 127-28). Peery notified Sun of his intention to terminate his dealership in mid-November, 1955, more than one month before Sun's allowance to McLean (R. 51, 337), and Peery ultimately went out of business in September, 1956, seven months after the assistance to McLean had terminated (R. 52). Crabtree likewise gave up his dealership in September, 1956 (R. 143).

dealers in the area—including Sun's—those dealers, if in retrospect they lost business, would have lost it whether or not Sun granted a price allowance to McLean. What the Court said in *Standard Oil* is equally applicable to the competitive situation at 13th and Pearl Streets (340 U. S. at 250):

> "[I]t must have been obvious to Congress that any price reductions initiated by a seller's competitor would, if not met by the seller, affect competition at the beneficiary's level or among the beneficiary's customers just as much as if those reductions had been met by the seller."

If we grant the Commission's premise that the answer to the question presented should turn on a counting of dealers' noses, then the meeting competition defense should not be available to Sun even if Super Test had actually offered a lower price to McLean in order to win his business. Under these circumstances, the competitive injury, if any, to the other four Sun dealers as a result of Sun's lower price to McLean would have been exactly the same as in the present case. Yet the Commission says that it would have honored the defense if such an offer had been made (Br. 27, 59). Patently, this elevates form over substance.

The Commission would have been satisfied, and there would have been no proceeding here, if Sun had done nothing and allowed the whole burden of the price war to fall directly on McLean. But how would this promote the welfare of the small businessman? Without financial assistance from their suppliers, the McLeans cannot survive against the price forays of powerful chains like Super Test.[55] The resources of the average retail dealer simply are not large enough to enable him

[55] See Cassady, *Price Making and Price Behavior in the Petroleum Industry* 275-76 (1954).

to hold out for the duration of any long drawn out price war" (R. 376).[58]

2. *The "competitive" area with the need allowances to all dealers.*—The Commission denies that its decision leaves Sun and certain of its dealers helpless in the face of price competition by independents" (Br. 37). It suggests as an alternative that "Sun might have responded with a price cut to all its dealers in the competitive area" (Br. 38). But the Commission carefully sidesteps indicating what the competitive area is. Does it have in mind only the four other Sun dealers besides McLean who were supposedly injured? Does it mean the eight Sun dealers who "were in the territory which comprised the northern one-third of Duval County, in which Jacksonville is located"? Or perhaps the "[t]hirty-eight service station operators . . . selling Sun products in the Jacksonville, Florida, area"? Or the "approximately 200 service stations in the region that included Florida"? (Br. 6). Or maybe even the 6,984 dealers which Sun had throughout the country? (Br. 5 n. 3). Where does the Commission want Sun to draw the line?

Experience has shown that no matter what geographic area an oil company selects in which to reduce its prices in a price war situation, the Commission invariably complains. Thus in the *American Oil Co.* case, *supra*, the Commission found that the respondent had discriminated in price against its Marietta, Georgia, dealers by granting allowances to its dealers in Smyrna, a city several miles to the

[58] The same point was made by Commissioner Elman, dissenting in *American Oil* (*supra*, Trade Reg. Rep. at p. 20,793): "Unless he received these . . . [competitive price allowances] from his supplier, a particular dealer would not be able to survive very long. If he had to pay more for gas than the price at which a station across the street was selling a competing brand, a dealer would not be likely to stay in business."

north. In the *Texaco* case, *supra*, the Commission complained that Texaco's general allowance to all its dealers in Portsmouth, Virginia, discriminated in price against its other dealers across the Elizabeth River in the separate cities of Norfolk, South Norfolk and Virginia Beach. Yet in *Sun Oil Co. (Norfolk)*, FTC Dkt. No. 6934 (Initial Decision May 17, 1962), the Examiner found that Sun's consignment plan, by which the company lowered the prices of all its dealers in the same Virginia cities, went beyond what was considered the area of effective competition.

In the *American Oil* case, Commissioner Elman in his dissent highlighted the dilemma which, under the Commission's view of dealer competition, an oil company faces in attempting to cope with a gasoline price war (Trade Reg. Rep. at p. 20,795):

> "If American had chosen to give equally large discounts to its Marietta dealers, where could it have safely stopped? Smyrna and Marietta are located along a major north-south highway with gasoline stations in every town along the way. A price cut to any station or group of stations would be bound to affect the sales of nearby stations up or down the road, and if American made its reductions to all stations on this highway there would undoubtedly be effects upon stations located on adjacent and intersecting roads. Under the Commission's theory American's only safe alternative would be to reduce its prices to all of its dealers everywhere. But is the Commission prepared to say that this enlargement of a local brush fire into a nuclear price war would have effects upon competition less injurious than those of the course of action which American actually pursued?"

The answer to Commissioner Elman's question was given by Judge Wisdom in the present case (R. 377):

> "[T]he Commission would have Sun enlarge the scale of the price war and risk a chain-reaction that

> might set off price wars throughout Florida and Southeast United States. . . . [O]ther oil companies, majors and non-majors, would have to meet Sun's price-cuts thereby spreading price wars and subjecting the margins of filling station operators to further compression."

To this, the Commission replies that after Sun's price allowance to McLean, a general price war broke out throughout the Jacksonville area anyhow. And it simultaneously asks: "Is there any basis for supposing that a general price cut within the competitive area could have affected sound economic conditions *more* adversely?" (Br. 38).

In the first place, there is no evidence that Sun's allowance to McLean on December 27, 1955, was the cause of the general price war. Quite the contrary, the general war developed only after Super Test further reduced its price on February 16, 1956. Only then did various other suppliers reduce their tank wagon prices. Sun thereupon felt compelled to drop its own tank wagon price to all its dealers in the area (R. 357).

Just because a generalized price war ultimately developed, with retail prices eventually plummeting to 19.9¢ per gallon, does not mean that Sun's attempt to limit the war to the corner of 19th and Pearl was as bad as, or worse than, an initial cut to all dealers "in the competitive area" would have been. On the contrary, the latter would have guaranteed an instantaneous and widespread price war. At least there was hope that the cut to McLean alone would confine the price disturbance.

Any immediate across-the-board cut, and its concomitant full-blown price war, would have worked greater competitive injury to Sun's dealers than the measure that Sun actually adopted. Although a general lowering of Sun's tank wagon price would have enabled its dealers to reduce

their pump prices and increase their gallonage at the expense of competing brand stations maintaining higher prices, this advantage would have been a fleeting one. The other oil companies obviously would not have stood by idly while their business evaporated. They would have responded by dropping their own tank wagon prices to keep themselves and their dealers competitive. At this point the Sun dealers would have been pumping their normal gallonage at a lower retail price and *at a lower profit margin* because the dealers themselves (as the record shows) would have absorbed part of the cost of the price war. How the Commission hopes to protect the small businessman by broadening the area of price wars is difficult to understand.

Wholly apart from the faulty economics underlying its general price cut proposal, the Commission ignores the law. Specifically, it blinks its eyes at the fact that the Robinson-Patman Act does not require a seller to choose "between ruinously cutting its prices to all its customers . . . or refusing to meet the competition and then ruinously raising its prices to its remaining customers to cover increased unit costs." *Standard Oil Co.* v. *Federal Trade Commission*, *supra*, 340 U. S. at 250. The Attorney General's National Committee to Study the Antitrust Laws was far closer to the mark than the Commission when it said that "a seller constrained by law to reduce prices to *some* only at the cost of reducing prices to *all* may well end by reducing them to *none*" (*Report*, p. 181).[57]

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[57] This was precisely the point of view later expressed by the Department of Justice in successfully opposing proposed legislation that would have narrowed the meeting competition defense (see *supra*, pp. 28-29).

3. *The prospect of vertical integration.*—As an alternative solution, the Hearing Examiner, with the approval of the Commission below, suggested that in order to "meet . . . competition at the dealer level" the supplier might change its method of distribution "by operating its own stations and thus being in direct competition with other stations which reduce prices" (R. 24, 43). The suggestion, in other words, was to vertically integrate and "bury the small, independent filling station retailer" (R. 376).

The Commission now disavows this solution. It points out that previously Sun as well as other oil companies had owned and operated their service stations but that they had shifted over to a lessee-dealer program to avoid the impact of chain stores taxes, social security, labor legislation, and the like (Br. 6, 54). And the Commission doubts, in view of these considerations, that the oil companies will revert to vertical integration at the retail level (Br. 54).

But the fact of the matter is that the Commission's concerted attack upon the meeting competition defense has already induced certain oil companies, including Sun, to adopt a form of vertical integration—a consignment method of distribution by which the company, as the owner of the gasoline, sets the retail price posted by its consignee dealers.[58] Mr. Justice Douglas predicted as much, albeit in a different legal context, in his *Standard Stations* dissent (337 U. S. at 320):

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[58] Such a consignment arrangement was upheld in *Simpson* v. *Union Oil Co. of California*, 1961 Trade Cases ¶69,936 (N. D. Cal. 1960) and by a hearing examiner in *Atlantic Refining Co.*, FTC Dkt. No. 7471 (Initial Decision March 7, 1962). A similar arrangement, however, was invalidated by another examiner in *Sun Oil Co. (Norfolk)*, *supra*. The move to consignment arrangements clearly indicates, contrary to the Commission's argument (Br. 54), that oil companies are quite willing to assume "responsibility for the retail price."

> "The elimination of these requirements contracts sets the stage for . . . oil companies to build service-station empires of their own. . . . The formula suggested . . . is either the use of the 'agency' device, which in practical effect means control of filling stations by the oil companies . . . or the outright acquisition of them by subsidiary corporations or otherwise. . . . [E]ither of those devices means increasing the monopoly of the oil companies over the retail field.[59]

The well-known fact that the oil companies had shifted away from vertical integration in the past did not signify to Mr. Justice Douglas that they would not revert to their former method of operation under sufficient economic compulsion.

The Court is not called upon to decide whether the independence of retail gasoline dealers today is ideally perfect. The fact remains that under a dealership arrangement large groups of individuals with small capital have the opportunity of becoming entrepreneurs; otherwise, they would be mere employees. As the District Court stated in *Susser* v. *Carvel Corp.*, 206 F. Supp. 636, 640 (S. D. N. Y. 1962):

> "The franchise system creates a class of independent businessmen; it provides the public with an opportunity to get a uniform product at numerous points of sale from small independent contractors, rather than from employees of a vast chain. The franchise system of operation is therefore good for the economy."

Inherent in the Commission's rejection of the meeting competition defense in this case is the very real danger that

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[59] See Lockhart & Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act*, 65 Harv. L. Rev. 913, 928-29 (1952).

the service station operator will not survive as a proprietor. One way or another he is bound to be eliminated from the competitive scene—either by becoming an agent or employee, or by going out of business entirely.

4. *The suggested raising of dealer profit margins.*—The real solution to the dealers' price war woes, according to the Commission, is for the oil companies to increase their dealers' profit margins. If that is done, the argument runs, dealers will have the "financial resources with which to withstand severe temporary competitive pressure" (Br. 39-40).

How an oil company can guarantee its dealers a specific margin of profit without fixing their resale prices, the Commission does not explain. And, in the absence of a price-fixing agreement, any talk of a higher dealer margin ignores the law of supply and demand. Why, after all, did McLean make only a 4.8¢ profit under normal conditions? Sun did not set his resale price. The force of competition from other dealers was what kept McLean from selling at a higher price and therefore increasing his margin.

Suppose that there had never been a price-war. Suppose, further, that Sun (consonant with the Commission's suggestion) had reduced its tank wagon price to all of its dealers, including McLean. Is there any reason to believe that McLean and the other Sun dealers would nevertheless have maintained their retail prices at the same level? Is it not reasonable to assume that certain dealers would have passed along to their customers the saving in gasoline cost in order to build up their volume at the expense of competitors? Thus in the *Standard Oil* case, after Standard had reduced its prices to its jobbers, the latter "reflected, in varying degrees, . . . [these] reductions in the cost of the gasoline to them by reducing their resale prices of that gasoline below the prevailing rates" (340 U. S. at 235). Thus, the cycle begins again; the price war is on.

There is another unrealistic aspect of the Commission's amorphous scheme to give independent retailers the "financial resources with which to withstand severe temporary competitive pressure" (Br. 39-40). Even if McLean had been operating at a higher margin, how could he alone have withstood the competitive blows of a 65-station chain? Is it not perfectly apparent that such chains will always have the power to pick off their small retail competitors one by one?

The conclusion is irresistible that the means suggested by the Commission for improving the lot of the average service station dealer are as unworkable as they are unlawful.

Judge Wisdom's scholarly opinion for the unanimous court below was plainly animated by a desire to safeguard the small businessman and to promote the cause of competition. The Commission's present construction of the Section 2(b) defense frustrates both of these major antitrust goals.

Conclusion.

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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October 1962.

APPENDIX.

Babcock-Cresente Letter.

Federal Trade Commission,
Washington, D. C., June 8, 1954.

Re BAM 3591.

Mr. James V. Cresente,
President, Cleveland Independent Gasoline Dealers Association, Inc.
Cleveland, Ohio

Dear Mr. Cresente:

This will acknowledge receipt of the complaints registered by your association with regard to the pricing practices followed in the Cleveland area by the Pure Oil Products Co., Shell Oil Co., Sinclair Refining Co., Gulf Refining Co., the Broadway Petroleum Corp., The Texas Co., and the Standard Oil Co. (Ohio).

From an examination of these various complaints it appears that the oil companies in question are discriminating in price between their respective dealers by granting temporary competitive allowances of from 0.5 to 0.7 cents per gallon on the condition that such dealers will reduce the retail price of gasoline to a specified figure.

In considering your request for an expeditious investigation of this matter, it should first be stated that the Commission has received, and continues to receive, numerous complaints alleging violation of the Robinson-Patman Act on the part of major oil companies in all sections of the country. In practically all of those instances in which investigations have been conducted, it has been established that the complained of discriminatory pricing practices were being followed in connection with local gasoline price wars which were the outgrowth of efforts by the major oil companies to meet the competition of dealers selling nonbranded gasoline at reduced prices. Under such circumstances, no

corrective action has been taken by the Commission because of the defense available to the sellers under section 2 (b) of the Robinson-Patman Act which provides, in substance, that a seller may defend himself against a charge of unlawful discrimination in price by showing that his lower price was granted in good faith for the purpose of meeting an equally low price of a competitor.

In *Standard Oil Company* v. *Federal Trade Commission* (340 U. S. 231) the Supreme Court declared that section 2 (b) provides a substantive defense to a charge of unlawful price discrimination regardless of the fact that competitive injury is sustained by customers to whom the lower price is not made available. In passing upon this point the Court stated in part as follows:

"In a case where a seller sustains the burden of proof placed upon it to establish its defense under section 2 (b), we find no reason to destroy that defense indirectly, merely because it also appears that the beneficiaries of the seller's price reductions may derive a competitive advantage from them or may, in a natural course of events, reduce their own resale prices to their customers. It must have been obvious to Congress that any price reduction to any dealer may always affect competition at that dealer's level as well as at the dealer's resale level, whether or not the reduction to the dealer is discriminatory. * * * We may, therefore, conclude that Congress meant to permit the natural consequences to follow the seller's action in meeting in good faith a lawful and equally low price of its competitor."

In the light of this construction of the statute, it follows that a seller is within his legal rights in confining his price reductions to dealers in the vicinity of the dealer or dealers whose competition he seeks to meet, even though such action results in injury to customers to whom similar reductions are not made available.

On the basis of the facts set forth in your letters, it does not appear that the situation prevailing in the Cleveland area at the present time differs materially from other situa-

tions in which investigations have been conducted and in which it was determined that no corrective action was warranted. In view of this fact, and because of our experience in investigations of numerous matters in which similar charges were made, it is not believed that the Commission, with its limited manpower and financial resources, would be warranted in conducting the requested investigation.

Another factor which has a material bearing upon our conclusion in this regard relates to investigations in the gasoline industry which are presently being conducted by the Department of Justice. These investigations include inquiry concerning the same practices referred to by you, i.e., discriminations in price and use of coercive tactics to fix the retail price of gasoline and, in addition, involve several of the same refiners. It would appear, therefore, that any action by the Commission at this time would represent a departure from the established policy of both the Commission and the Department of Justice to avoid duplication of effort in matters in which both agencies exercise concurrent jurisdiction.

In view of the foregoing, it is not believed that the Commission would be warranted in conducting further action with respect to this matter at the present time.

Very truly yours,

HARRY A. BABCOCK,
Director, Bureau of Investigation.

Appendix.

Babcock-Snow Letters.

Federal Trade Commission,
Bureau of Investigation,
Washington, August 18, 1954.

Mr. William D. Snow,
General Counsel, National Congress of
Petroleum Retailers, Inc.,
Detroit, Mich.

Dear Mr. Snow:

This will acknowledge receipt of your letter of July 15, 1954, in the form of a complaint filed in behalf of the Mississippi Service Station Operators Association, Jackson, Miss., in which you allege that the Texas Co. is discriminating in price by allowing one of its service stations located in Jackson, Miss., a 1-cent-per-gallon discount which is not allowed to other retailers in the same vicinity for the purpose of controlling the retail price at which the gasoline is to be resold.

In considering your request for investigation of this matter it should be first stated that the Commission has received and continues to receive numerous complaints alleging violation of the Robinson-Patman Act on the part of the major oil companies in all sections of the country. Recently investigations have been undertaken in Pennsylvania and New Jersey and in a number of Midwestern and Southern States, including Mississippi. However, the evidence obtained during the course of these investigations failed to provide a proper basis for the Commission to have reason to believe that the statutes administered by it have been violated as a result of the practices of the major oil companies. In practically all instances in which investigations have been conducted it has been established that the complained-of discriminatory pricing practices were being

followed in connection with local gasoline price wars which were the outgrowth of efforts of the major oil companies to meet competition of dealers selling nonbranded gasoline at reduced prices.

Under such circumstances no corrective action has been taken by the Commission because of the defense available to the sellers under section 2 (b) of the Robinson-Patman Act, which provides in substance that a seller may defend himself against a charge of unlawful discrimination in price by showing that his lower price was granted in good faith for the purpose of meeting an equally low price of a competitor.

In *Standard Oil Company* v. *Federal Trade Commission* (340 U. S. 231), the Supreme Court declared that section 2 (b) provides a substantive defense to a charge of unlawful price discrimination, regardless of the fact that competitive injury is sustained by customers to whom the lower price is not made available. In passing upon this point the court stated, in part, as follows:

"In a case where a seller sustains the burden of proof placed upon it to establish its defense under section 2 (b), we find no reason to destroy that defense indirectly, merely because it also appears that the beneficiaries of the seller's price reductions may derive a competitive advantage from them or may, in a natural course of events, reduce their own resale prices to their customers. It must have been obvious to Congress that any price reduction to any dealer may always affect competition at that dealer's level as well as at the dealer's resale level, whether or not the reduction to the dealer is discriminatory. * * * We may, therefore, conclude that Congress meant to permit the natural consequences to follow the seller's action in meeting in good faith a lawful and equally low price of its competitor."

In the light of the meaning of the statute as determined by the Supreme Court it follows that a seller is within his legal rights in confining his price reductions to dealers in the vicinity of the dealer or dealers whose competition he seeks to meet, even though such action results in injury to

customers to whom similar reductions are not made available.

On the basis of the facts set forth in your letter, it would not appear that the situation prevailing in the Jackson, Miss., area at the present time differs materially from other situations in which investigations have been conducted and which it was determined that no corrective action was warranted.

In addition to the foregoing, the Commission is informed through established liaison channels that the Antitrust Division, Department of Justice, is conducting investigations in the gasoline industry which include inquiry concerning the same practices referred to by you, i.e., discrimination in price and the use of coercive tactics to fix the retail price of gasoline.

In view of the foregoing, it appears that further and additional investigation may not be warranted at this time, particularly where such investigation might involve practices on the part of the Texas Co. similar in nature to those indicated by you.

Your interest and cooperation in bringing this matter to the attention of the Commission are appreciated.

Very truly yours,

HARRY A. BABCOCK,
Director, Bureau of Investigation.

Appendix.

FEDERAL TRADE COMMISSION,
BUREAU OF INVESTIGATION,
Washington, November 22, 1954.

MR. WILLIAM D. SNOW,
General Counsel, National Congress of
Petroleum Retailers, Inc.,
Detroit, Mich.

Dear Mr. Snow:

I am in receipt of your letter of November 3, 1954, with further reference to a complaint which you previously filed against the Texas Co., alleging that it is selling gasoline to a filling-station operator, Dixon Service Station, located on North State Street, Jackson, Miss., and to other stations at a price of 1 cent per gallon below the price offered Cross Service Station, also located on North State Street, and to certain other independent filling stations.

The allegations as to the facts set forth in your letter of July 15 as further interpreted by your letter of November 3, together with the stated legal precedents and argument set forth by you, have been given careful study and consideration. As previously stated to you in my letter of August 18, 1954, a number of investigations have been conducted as a result of the receipt of complaints of a substantially similar nature. Full factual information, almost if not identical with that supplied by you, has been presented to the Commission regarding the practices of the major oil companies. Specific instances where investigation has not only disclosed such practices, but the effect of such practices on competition, have been the subject of study and consideration. In no instance has the Commission issued a complaint where it has been shown that a major oil company reduced its price to a filling-station operator for the purpose of enabling such operator to meet a competitive price.

The investigations heretofore conducted have required the use of more than a proportionate share of the available

funds and personnel, and I believe you will agree that the funds and time expended in obtaining evidence and information to be used as a basis for study and consideration of the complex and difficult problem presented demonstrate a sincere desire on the part of the Commission to fully utilize its statutory authority in an effort to eliminate any actionable unfair methods of competition or discriminatory pricing practices in the petroleum industry.

In view of the foregoing circumstances, it would appear inadvisable for the Commission to initiate an additional investigation which it seems may produce facts and circumstances as a basis for action which would not be substantially different from those already considered and upon which no formal action has been taken.

Your interest in bringing this matter to the attention of the Commission is appreciated, and if you feel that the Commission may be of further service to you in this or other matters, you may be assured of its cooperation.

Very truly yours,

HARRY A. BABCOCK,
Director, Bureau of Investigation.

Appendix.

GWYNNE-HUMPHREY LETTER.

FEDERAL TRADE COMMISSION,
Washington, March 9, 1956.

Hon. HUBERT H. HUMPHREY,
Chairman, Subcommittee on Retailing, Distribution, and Fair Trade Practices, Senate Select Committee on Small Business, Washington, D. C.

Dear Mr. Chairman:

At the hearings on February 18, 1956, before the Subcommittee on Retailing, Distribution, and Fair Trade Practices of the Select Committee on Small Business of the Senate you read into the record a portion of the decision filed on October 1, 1955, by the United States District Court for the District of Connecticut in *Enterprise Industries, Inc.* v. *The Texas Company* (par. 68,163, CCH Rep.), the key point in which you were concerned being the statement that "The act does not go so far as to allow discriminatory price cutting to enable a buyer to meet competition, but only to enable the seller to meet a lawful price of the seller's competitor." You then referred to the fact that the Commission has in the past "sent out letters advising, under similar situations, that 'No corrective action has been taken in such cases by the Commission because of the probable defense available to the sellers under Section 2 (b) of the Clayton Act, as amended by the Robinson-Patman Act.'" You then inquired into the Commission's present views upon this point, and after they were stated it was asked that they be incorporated in a letter to you.

The question in issue arose early in March 1955, when a member of the Commission referred to the General Counsel drafts of several letters relating to the closing of investigations of gasoline price wars which were before the Commission for approval. The request for an expression of the views of the General Counsel related to several situations involving the application of section 2 (b) of the

Clayton Act, and included the application of that section to a situation where a seller granted a price discrimination to a buyer for the purpose of enabling the buyer to meet the prices of his competitors. In April 1955 the General Counsel, in response to this request, advised the Commissioner that although the particular point had not been decided in litigation, he was of the view that a discrimination in price granted by a seller to a buyer to enable the latter to meet the prices of his competitors was probably outside the protection of section 2 (b). This view was based principally upon the language of the statute itself and upon the legislative history showing the purposes of the change from the "meeting competition" language of the original section 2 of the Clayton Act to the present language in section 2 (b) of that act.

On May 3, 1955, the Commission approved revised letters consistent with the view expressed by the General Counsel and directed that the memorandum discussing the application of section 2 (b) be reproduced and distributed to appropriate members of the staff. It must be recognized that the views thus expressed and adopted are necessarily speculative and perhaps the final answer must await a decision on this point by the Supreme Court, though it is interesting to observe that in the decision mentioned above the district court reached the same conclusion.

The adoption of this view by the Commission was for staff guidance and administrative purposes, primarily in connection with the scope of staff investigations, and a final determination by the Commission must await decision in specific cases. There it must ultimately be controlled by the facts as they are developed in the specific case and the opinion of the Commission upon the application of the law to the facts of that case, after briefs are filed and oral argument is had.

It is hoped that this affords the information desired.

By direction of the Commission.

JOHN W. GWYNNE, Chairman.